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CLERK OF THE SUPREME COURT
STATE OF MONTANA

No. OP 10-0280

IN THE SUPREME COURT OF THE STATE OF MONTANA

UNITED STATES OF AMERICA,

Petitioner,

v.

JUVENILE MALE,

Respondent.

On Certification Of Question Of Law From
The Supreme Court Of The United States
(No. 09-940)

BRIEF OF THE UNITED STATES
(Unsealed – Containing Redacted Confidential Information)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Constitutions, statutes, regulation, guideline and rule:

Statute, regulation, guideline and rule—Continued: Page

Miscellaneous:

STATEMENT OF THE ISSUE

Whether respondent's duty under Montana law to remain registered as a sexual offender is contingent upon the validity of the conditions of the now-expired federal juvenile-supervision order that required respondent to register as a sex offender or instead is an independent requirement unaffected by the validity of the federal juvenile-supervision conditions.

STATEMENT OF THE CASE

On June 9, 2005, the United States District Court for the District of Montana adjudicated respondent Juvenile Male (S.E.) delinquent under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5037, and ordered him to serve two years of official detention, to be followed by juvenile-delinquent supervision until his 21st birthday. *See* App. B, *infra*, 23a-26a. On July 26, 2007, the district court modified the conditions of S.E.'s juvenile supervision to include a requirement that S.E. register as a sex offender where he lives, works, or goes to school. *Id.* at 18a-20a, 22a. On September 10, 2009, the United States Court of Appeals for the Ninth Circuit vacated those conditions of S.E.'s term of juvenile supervision, after holding that the registration and notification provisions of the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901-16962, cannot constitutionally be applied to juvenile sex offenders adjudicated delinquent under the Federal Juvenile Delinquency Act before

SORNA's enactment. *United States v. Juvenile Male*, 590 F.3d 924. On February 9, 2010, the United States filed a petition for a writ of certiorari asking the Supreme Court of the United States to review the court of appeals' decision, and noting an initial question of mootness because the term of S.E.'s juvenile supervision had expired. *See* Pet. at 27-32, *United States v. Juvenile Male*, 130 S. Ct. 2518 (2010) (No. 09-940), *available at* 2010 WL 531758. On June 7, 2010, the Supreme Court certified a question of state law to this Court relevant to the mootness issue, 130 S. Ct. 2518, and on June 23, 2010, this Court accepted certification of that question and ordered briefing.

STATEMENT OF FACTS

This Court accepted the certified question "based on the statement of facts provided by the Supreme Court of the United States." Accordingly, the Statement of Facts that follows is derived from the statement provided by the Supreme Court, supplemented where indicated with additional undisputed information.

1. In or around 2000, when he was approximately 13 years old, S.E. began sexually abusing a ten-year-old boy (W.J.H.) on the Fort Belknap Indian Reservation in Montana. App. B, *infra*, 23a, 27a, 32a. The abuse continued for at least two years and included acts of sodomy, oral sex, and masturbation. *See id.* at 27a-29a, 32a. S.E. admitted that he forced W.J.H. to perform those sexual acts.

Presentence Investigation Report (PSR) ¶¶ 18, 22; 6/9/05 Sent. Tr. 4-5 (no objection to PSR).

In 2005, S.E. was charged in the United States District Court for the District of Montana with juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5037. S.E. eventually pleaded "true" to knowingly engaging in sexual acts with a person under 12 years of age, in violation of 18 U.S.C. §§ 1153(a), 2241(c) (2000). On June 9, 2005, the district court accepted S.E.'s plea and adjudged him delinquent. App. B, *infra*, 23a-26a. The district court ordered S.E. to serve two years of official detention, to be followed by juvenile-delinquent supervision until his 21st birthday. The court also ordered S.E. to live in a pre-release center for the first six months of his juvenile supervision and to follow the center's conditions of residency. *See generally United States v. Juvenile Male*, 130 S. Ct. 2518, 2518 (2010) (per curiam).

2. On July 27, 2006, Congress enacted SORNA to establish "a comprehensive national system for the registration of [sex] offenders," 42 U.S.C. § 16901. SORNA both encourages States to conform their sex-offender-registration programs to minimum national standards, *see id.* §§ 16912, 16925, and imposes a direct federal mandate on sex offenders to register with state registries and keep those registrations current, *see id.* § 16913. SORNA covers offenders who were adjudicated juvenile delinquents for certain serious sex of-

fenses. A juvenile is deemed "convicted" of a sex offense for purposes of SORNA, and thus required to register under SORNA, if the juvenile was "14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an offense." *See id.* § 16911(8). On February 28, 2007, the Attorney General issued an interim rule confirming that SORNA's requirements "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. § 72.3; *see generally Juvenile Male*, 130 S. Ct. at 2518-2519.

3. In July 2007, the district court revoked S.E.'s juvenile supervision because S.E. failed to comply with the requirements of his pre-release program. The court ordered S.E. to serve an additional six-month term of detention, to be followed by continued juvenile supervision until his 21st birthday. The government argued that, consistent with SORNA, S.E. should be required to register as a sex offender during at least his term of juvenile supervision. As "special conditions" of S.E.'s juvenile supervision, the district court ordered S.E. to register as a sex offender and to keep his registration current. On , S.E. turned

21 and his order of juvenile supervision expired.[1] *See generally Juvenile Male*, 130 S. Ct. at 2519.

4. On September 10, 2009, the United States Court of Appeals for the Ninth Circuit vacated the sex-offender-registration conditions of S.E.'s juvenile supervision. *Juvenile Male*, 590 F.3d 924. The court of appeals determined that "retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA's passage violates the Ex Post Facto Clause of the United States Constitution." *Id.* at 927. The court thus held that "SORNA's juvenile registration provision may not be applied retroactively to individuals adjudicated delinquent under the Federal Juvenile Delinquency Act." *Id.* at 928; *see generally Juvenile Male*, 130 S. Ct. at 2519.

5. The United States asked the Supreme Court of the United States to grant a writ of certiorari to review the court of appeals' decision. In its petition, the United States noted that the case raises an initial question of mootness, because S.E. challenged only the conditions of his juvenile supervision. Those conditions, however, expired on S.E.'s 21st birthday ( ), before the

[1] Before he turned 21, S.E. did register as a sex offender with the State of Montana. As of the filing of this brief, S.E.'s Montana registration information is still available online and was last updated on July 19, 2010.

Ninth Circuit issued its decision, and thus S.E. was no longer subject to those sex-offender-registration conditions. *See generally Juvenile Male*, 130 S. Ct. at 2519.

In light of that fact, the Supreme Court noted that "this case likely is moot unless [S.E.] can show that a decision invalidating the sex-offender-registration conditions of his juvenile supervision would be sufficiently likely to redress 'collateral consequences adequate to meet Article III's injury-in-fact requirement.'" *Juvenile Male*, 130 S. Ct. at 2519 (quoting *Spencer v. Kemna*, 523 U.S. 1, 14 (1998)). The Supreme Court explained that "[p]erhaps the most likely potential 'collateral consequenc[e]' that might be remedied by a judgment in [S.E.'s] favor is the requirement that [S.E.] remain registered as a sex offender under Montana law." *Id.* (second set of brackets in original) (noting that, by the time of the Ninth Circuit's decision, S.E. had registered as a sex offender in Montana). Accordingly, the Supreme Court certified a question of state law to this Court to learn whether a decision vacating S.E.'s sex-offender-registration conditions "would make it sufficiently likely that [S.E.] could remove his name and identifying information from the Montana sex offender registry." *Id.* (internal quotation marks and citation omitted). Specifically, the Court asked:

> Is [S.E.'s] duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, see Mont. Code Ann. §§ 46-23-502(6)(b), 41-5-1513(1)(c) (2005); *State* v. *Villanueva*, 328 Mont. 135, 138-140, 118 P.3d 179, 181-182 (2005); see

> also § 46-23-502(9)(b) (2009), or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions, see § 46-23-502(1) (2009); 2007 Mont. Laws ch. 483, § 31, p. 2185?

Id. at 2519-2520. An answer to that question of state law would help the Supreme Court "determine whether this case presents a live case or controversy." *Id.* at 2520.

STANDARD OF REVIEW

Under Montana Rule of Appellate Procedure 15(3), this Court may answer a question of law certified to it by a qualifying court, and the Court's "review, therefore, is purely an interpretation of the law as applied to the agreed facts underlying the action." *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶ 4, 353 Mont. 173, ¶ 4, 219 P.3d 1249, ¶ 4.

SUMMARY OF ARGUMENT

The answer to the certified question rests on an interpretation of Montana's Sexual or Violent Offender Registration Act (SVORA or Act), Mont. Code Ann. §§ 46-18-255, 46-23-501 to -520, and this Court's case law interpreting that Act. In the view of the United States, SVORA's text and this Court's case law provide a definitive answer to the certified question.

1. Under the 2007 amendments to SVORA, S.E. is required to remain registered as a sexual offender because he was adjudicated delinquent in youth

court for a federal offense that is reasonably equivalent to the SVORA offenses of aggravated sexual assault on a child and sexual intercourse without consent, and he was sentenced after July 1, 1989. *See* Mont. Code Ann. §§ 46-23-502(9)-(10), -504; 2007 Mont. Laws ch. 483, §§ 19, 31(1).[2] That registration obligation is an independent requirement of Montana law that is wholly unaffected by S.E.'s federal supervision conditions. On that basis alone, the Court should answer the certified question by holding that S.E.'s duty to remain registered as a sexual offender under Montana law is not contingent on the validity of the conditions of S.E.'s now-expired supervision order, but rather is an independent requirement of Montana law.

2. Although the Court need not inquire further, Montana law requires S.E. to remain registered as a sexual offender for another reason—also independent of the conditions of his juvenile-supervision order. Because of his juvenile-delinquency adjudication in federal district court, S.E. is required to register (and remain registered) as a sex offender under federal law. *See* 42 U.S.C. §§ 16911(8), 16913, 16915. That obligation gives rise to a corresponding duty to register as a sexual offender under Montana law. *See State v. Villanueva*, 2005 MT 192, ¶ 16, 328 Mont. 135, ¶ 16, 118 P.3d 179, ¶ 16; Mont. Code Ann.

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[2] Unless otherwise indicated, citations to the Montana Code Annotated are to the 2009 version.

§ 46-23-502(9)(b). Although this duty is not entirely independent of federal law, it is independent of the conditions of S.E.'s now-expired supervision order and is unaffected by the validity or invalidity of those conditions. This distinct obligation to register under Montana law compels the same answer to the certified question.

3. The United States expresses no view on whether S.E.'s now-expired supervision conditions would, on their own, require S.E. to remain registered as a sexual offender under Montana law. This would depend on the answers to a number of subsidiary questions, and the answers to those questions are not readily discernible from the Act or relevant case law. Because S.E. is required to remain registered as a sexual offender under Montana law for reasons separate and apart from his conditions of juvenile supervision, the Court can answer the certified question without deciding this issue.

ARGUMENT

S.E.'s Duty Under Montana Law To Remain Registered As A Sexual Offender Is Independent Of The Conditions Of His Now-Expired Federal Term Of Juvenile Supervision

SVORA, Mont. Code Ann. §§ 46-18-255, 46-23-501 to -520, requires a "sexual offender" to register, and remain registered, with the appropriate registration agency. *See id.* §§ 46-23-504, 46-23-506. A "sexual offender" is defined as "a person who has been convicted of or, in youth court, found to have com-

mitted or been adjudicated for a sexual . . . offense." *Id.* § 46-23-502(10). A "sexual offense," in turn, includes "any violation of a law of . . . the federal government that is reasonably equivalent to a [listed violation] or for which the offender was required to register as a sexual offender after an adjudication or conviction." *Id.* § 46-23-502(9)(b).

A. S.E. is required to remain registered as a sexual offender under Montana law because he has been adjudicated in youth court for a federal offense that is reasonably equivalent to the SVORA offenses of aggravated sexual assault on a child and sexual intercourse without consent.

Under the 2007 amendments to SVORA, any person sentenced after July 1, 1989, who has been, "in youth court, found to have committed or been adjudicated for" a "violation of a law . . . of the federal government" that is "reasonably equivalent" to a listed violation of Montana law is a "sexual offender" subject to state registration duties. Mont. Code Ann. § 46-23-502(9)(b), (10); 2007 Mont. Laws ch. 483, § 31(1). S.E. is such a sexual offender because (a) he was adjudicated delinquent for a violation of federal law "reasonably equivalent" to the listed offenses of aggravated sexual assault on a child and sexual intercourse without consent, (b) the adjudication was in "youth court," and (c) he was "sentenced" after July 1, 1989.

1. S.E.'s federal offense is reasonably equivalent to the SVORA offenses of aggravated sexual assault on a child and sexual intercourse without consent.

The federal district court adjudicated S.E. delinquent for a "violation of a law . . . of the federal government," specifically, for knowingly engaging in sexual acts with a person under the age of 12 years, in violation of 18 U.S.C. § 2241(c) (2000). App. B, *infra*, 23a, 32a. Federal law defines the term "sexual act" to require direct genital contact; penetration; or the intentional touching, "not through the clothing," of the genitalia of a person under the age of 16 years with abusive or sexual intent. *See* 18 U.S.C. § 2246(2). S.E.'s violation of this federal law is "reasonably equivalent" to the SVORA offenses of aggravated sexual assault on a child and sexual intercourse without consent.

Under Montana law, the crime of sexual assault is defined as "knowingly subject[ing] another person to any sexual contact without consent." Mont. Code Ann. § 45-5-502(1). "Sexual contact" is defined as "touching of the sexual or other intimate parts of the person of another, directly or through clothing," with abusive or sexual intent. *Id.* § 45-2-101(67). A lack of consent for purposes of the offense is established if the victim is under the age of 14 and the offender is three or more years older than the victim. *Id.* § 45-5-502(5)(a)(ii). And a sexual assault is subject to enhanced punishment if either (a) the victim is under the age of 16 and the offender is three or more

years older than the victim, or (b) the offender inflicts bodily injury in the course of the sexual assault. *Id.* § 45-5-502(3). The former aggravated type of sexual assault is a registrable "sexual offense" under SVORA ("aggravated sexual assault on a child"). *Id.* § 46-23-502(9)(a) ("sexual offense" includes any violation of "45-5-502(3) (if the victim is less than 16 years of age and the offender is 3 or more years older than the victim)").

The crime of sexual intercourse without consent is also a listed "sexual offense" under SVORA. *See* Mont. Code Ann. § 46-23-502(9)(a) ("sexual offense" includes any violation of "45-5-503"). That crime requires the offender to "knowingly ha[ve] sexual intercourse without consent with another person." *Id.* § 45-5-503(1). A lack of consent is conclusively demonstrated if the victim is under the age of 16. *See id.* § 45-5-501(1)(a)(ii)(D). And "[s]exual intercourse" is defined as "penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by a body member of another person, or penetration of the vulva or anus" by another person with a foreign object with sexual or abusive intent. *See id.* § 45-2-101(68).

The Montana legislature did not define the term "reasonably equivalent," and this Court has not had occasion to give it meaning.[3] Other jurisdictions interpreting similar language in analogous provisions have looked to whether the two offenses are "analogous" or "substantially similar." *See, e.g.*, *Doe v. N.H. Dep't of Safety*, No. 2009-824, 2010 WL 2595338, at *4 (N.H. Apr. 22, 2010) (finding two sexual offenses to be "reasonably equivalent" because even though "the elements are not exactly the same, they are analogous"); *In re Doe*, 855 A.2d 1100, 1104-05 (D.C. 2004) (finding that "substantially similar" should be "given a broad construction to effectuate the goals of the [sex offender registration] legislation"). Under any plausible definition, S.E.'s violation of Section 2241(c) of Title 18 of the United States Code is "reasonably equivalent" to the SVORA offenses of aggravated sexual assault on a child and sexual intercourse without consent.

a. *Aggravated sexual assault on a child.* The "sexual act" element of S.E.'s federal offense is reasonably equivalent to the "sexual contact" element of the Montana aggravated sexual assault on a child crime. Indeed, whereas "sexual

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[3] A federal district court in Montana found the Washington offense of second-degree child molestation to be "reasonably equivalent" to Montana sexual abuse of a child under SVORA but, because the statutory offense elements were the same, the court did not further explicate the meaning of "reasonably equivalent." *See Dunsmore v. Law*, No. 09-41, 2009 WL 2134916, **1, 7 (D. Mont. July 14, 2009).

contact" under Montana law includes any touching of the "intimate parts" of another person, "directly or through clothing," with abusive or sexual intent, *see* Mont. Code Ann. § 45-2-101(67), a "sexual act" under federal law requires direct genital contact; penetration; or the intentional touching, "not through the clothing," of the genitalia of a person under the age of 16 years with abusive or sexual intent, *see* 18 U.S.C. § 2246(2).[4] Accordingly, the federal definition of "sexual act" is reasonably equivalent to, and even more restrictive than, Montana's definition of "sexual contact."

The federal offense committed by S.E. also satisfies the age requirements set forth in the SVORA offense of aggravated sexual assault on a child. *See* Mont. Code Ann. § 46-23-502(9)(a). The SVORA offense of aggravated sexual assault on a child makes a victim's age relevant in four respects. First, aggra-

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[4] The federal definition does not explicitly require abusive or sexual intent for the two subsections covering penile penetration of the vulva or anus and oral contact with the penis, vulva, or anus. *See* 18 U.S.C. § 2246(2)(A)-(B). But that simply reflects that "one who engages in such contact inherently intends to do so for sexual purposes." *United States v. Demarrias*, 876 F.2d 674, 676 (8th Cir. 1989) (discussing paragraphs (A) and (B) of the federal definition). The federal definition of "sexual act" also differs from the Montana definition of "sexual contact" in referencing an intent to arouse or gratify the sexual desire of "any person," 18 U.S.C. § 2246(2)(C)-(D), as opposed to a purpose to arouse or gratify the sexual desires of "either party," Mont. Code Ann. § 45-2-101(67)(b). Such minor differences do not undermine the conclusion that the provisions are reasonably equivalent. *See Doe*, 2010 WL 2595338, at *4 (statutes "reasonably equivalent" where one expressly requires "sexual penetration" and the other does not).

vated sexual assault requires a lack of consent, and consent is deemed ineffective if, *inter alia*, the victim is under the age of 14 years. *See* Mont. Code Ann. § 45-5-502(1), (3), (5)(a). Second, the SVORA offense of aggravated sexual assault on a child requires the victim to be under the age of 16 years. *See id.* § 46-23-502(9)(a). Third, where the victim is under the age of 14 years, the lack-of-consent element of aggravated sexual assault is conclusively satisfied if the offender is at least three years older than the victim. *See id.* § 45-5-502(1), (5)(a)(ii). Fourth, the SVORA offense of aggravated sexual assault on a child likewise requires that the offender be at least three years older than the victim. *See id.* § 46-23-502(9)(a).

S.E.'s violation of federal law satisfies all four of the age-based components of the SVORA offense of aggravated sexual assault on a child. Because the federal offense requires the victim to be under the age of 12 years, *see* 18 U.S.C. § 2241(c) (2000), conduct constituting the federal offense will necessarily meet the first and second victim-age requirements. The third and fourth age-based components of the SVORA offense of aggravated sexual assault on a child are also met here. Although a violation of the federal offense will not always involve a three-year age gap, S.E.'s particular violation of the federal statute did, because S.E. is more than three years older than his victim, W.J.H. The court records in this case establish that S.E.'s birth date is , App. B, *infra*,

23a, and W.J.H.'s birth date is , *id.* at 27a; *see also id.* at 32a (charging that W.J.H. had not attained the age of 12 years in the time period continuing through); *id.* at 30a-31a (admission to the same effect by S.E.). The age gap between S.E. and his victim is thus three years, —more than the three years sufficient to make S.E.'s federal crime equivalent to the SVORA offense of aggravated sexual assault on a child.

This Court has not decided whether it is appropriate to examine the ages of the victim and the offender in a given case, when those facts are not elements of the criminal offense, to determine whether an offense qualifies as a "sexual offense" under SVORA. *Cf. State v. Hamilton*, 2007 MT 167, ¶ 15, 338 Mont. 142, ¶ 15, 164 P.3d 884, ¶ 15 (noting disagreement among courts as to whether facts underlying the conviction should be considered in determining reasonable equivalence, but not deciding issue). SVORA, however, itself makes clear that such an inquiry is not only permitted, but required. SVORA treats violations of numerous Montana laws as registrable "sexual offenses" only if the age of the victim, the age of the offender, or both, satisfy the additional criteria set forth in the Act—yet, in many instances, those showings are not elements of the listed Montana crime. *See generally* Mont. Code Ann. § 46-23-502(9)(a).

For example, a violation of Section 45-5-504(1) of the Montana Code Annotated, which defines the crime of indecent exposure, qualifies as a registrable "sexual offense" under SVORA only "if the victim is under 18 years of age and the offender is 18 years of age or older." *See* Mont. Code Ann. § 46-23-502(9)(a). Those facts are not elements of the indecent-exposure offense, *see id.* § 45-5-504(1), but rather are relevant only to determine whether registration is required for a particular commission of that crime. Similarly, violations of Sections 45-5-301 (unlawful restraint), 45-3-302 (kidnapping), and 45-5-303 (aggravated kidnapping) only qualify as a "sexual offense" under SVORA "if the victim is less than 18 years of age and the offender is not a parent of the victim"—a factual inquiry beyond the offense elements.

Thus, in determining whether a particular statutory violation is a registrable "sexual offense," SVORA necessarily allows an examination of at least the facts specified in SVORA's definition of "sexual offense," irrespective of whether those facts are also elements of the offense. *Cf., e.g.*, *United States v. Mi Kyung Byun*, 539 F.3d 982, 990-994 (9th Cir.) (holding that, under SORNA, courts may examine the age of the victim in a particular case, regardless of whether it is a statutory element, to decide whether the crime is a registrable offense "against a minor"), *cert. denied*, 129 S. Ct. 771 (2008). A contrary rule would produce the absurd result that the specifically described violations of the Montana statutes

listed in the "sexual offense" definition could not themselves qualify as "sexual offenses." *See Gannett Satellite Info. Network, Inc. v. State*, 2009 MT 5, ¶ 19, 348 Mont. 333, ¶ 19, 201 P.3d 132, ¶ 19 ("Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it."). A limited factual examination is thus allowed and, here, S.E.'s violation of federal law involved an age gap sufficient to meet the requirements of the SVORA offense of aggravated sexual assault on a child, because S.E. was three or more years older than his victim.

Accordingly, S.E. was adjudicated delinquent for a federal offense "reasonably equivalent" to the SVORA offense of aggravated sexual assault on a child, and S.E.'s adjudication therefore qualifies as a "sexual offense" under SVORA.

b. *Sexual intercourse without consent.* S.E.'s offense also qualifies as "reasonably equivalent" to the Montana crime of sexual intercourse without consent, Mont. Code Ann. § 45-5-503, which is also a listed "sexual offense" under SVORA, *id.* § 46-23-502(9)(a). A lack of consent is conclusively proved if the victim is under 16 years of age, *id.* § 45-5-501(1)(a)(ii)(D), which is true of every victim under the federal offense, *see* 18 U.S.C. § 2241(c) (2000) (victim must be under 12 years old). The "sexual act" element of the federal offense is more expansive than the "sexual intercourse" element of the Montana offense, in that the federal element includes certain sexual genital touchings not involving pene-

tration of the vulva, anus, or mouth. *Compare* 18 U.S.C. § 2246(2), *with* Mont. Code Ann. § 45-2-101(68) (requiring penetration of one of those body parts). But S.E.'s plea hearing shows that his adjudication rests in part on the subsection of the federal "sexual act" definition that covers penile contact with the anus occurring "upon penetration, however slight." 18 U.S.C. § 2246(2)(A); *see* App. B, *infra*, 29a (S.E. admits that he "put [his] penis in [the victim's] back end."). An adjudication under that subsection of the federal offense is categorically equivalent to Montana's definition of "sexual intercourse," under which "any penetration, however slight, is sufficient." Mont. Code Ann. § 45-2-101(68)(b); *see generally Shepard v. United States*, 544 U.S. 13, 20 (2005) (holding that, under the so-called modified categorical approach, a court may examine "the statement of factual basis for the charge, shown by a transcript of plea colloquy," to determine upon which of several subsections a defendant's conviction rests) (citation omitted). Accordingly, S.E. was adjudicated delinquent for a federal offense that is "reasonably equivalent" to the SVORA offense of sexual intercourse without consent and, for that reason as well, S.E.'s adjudication qualifies as a "sexual offense" under SVORA.

2. A federal court adjudicating a juvenile offense qualifies as a "youth court" under SVORA.

S.E. is a "sexual offender" under SVORA because he was adjudicated delinquent of that "sexual offense" in a "youth court" within the meaning of SVORA. *See* Mont. Code Ann. § 46-23-502(10).

SVORA, unlike the Montana Youth Court Act, provides no definition of the term "youth court." *Cf.* Mont. Code Ann. § 41-5-103(49) (defining "youth court" as used in the Montana Youth Court Act to refer to specific Montana state courts); *State v. Hastings*, 2007 MT 294, ¶ 16, 340 Mont. 1, ¶ 16, 171 P.3d 726, ¶ 16. But the definition of the term "sexual or violent offender" in SVORA shows that SVORA uses "youth court" in this context to include juvenile courts in jurisdictions other than Montana.

Specifically, the term "sexual or violent offender" under SVORA is defined to include persons who have been either "convicted" or "in youth court[] found to have committed or been adjudicated for" a sexual offense. Mont. Code Ann. § 46-23-502(10). The term "sexual offense," in turn, is defined to include a violation of certain Montana listed offenses, *id.* § 46-23-502(9)(a), as well as "any violation of a law of another state, a tribal government, or the federal government that is reasonably equivalent to a [listed violation] or for which the offender was required to register as a sexual offender after an adjudication *or*

conviction," *id.* § 46-23-502(9)(b) (emphasis added). The statutory reference to an "adjudication" under federal, tribal, or another State's law for which the offender was required to register must mean that juvenile-court adjudications in jurisdictions other than Montana may trigger registration duties under SVORA. But if the term "youth court" included only Montana state courts, no foreign adjudications would give rise to a registration requirement and the inclusion of "adjudication[s]" in Subsection (9)(b) would be superfluous. *See Gannett Satellite Info. Network*, ¶ 19 (court will not adopt a statutory construction "that renders any section of the statute superfluous or fails to give effect to all the words used"). Given that the Montana legislature specifically amended SVORA in 2007 to add foreign "adjudication[s]" (the prior version of this provision spoke only to registration requirements "after conviction," Mont. Code Ann. § 46-23-502(9)(b) (2005)), any such construction would contravene legislative intent.

Accordingly, for purposes of SVORA's registration requirement, when the federal district court adjudged S.E. a juvenile delinquent under the Federal Juvenile Delinquency Act, that action was an adjudication in "youth court."

3. S.E. was "sentenced," within the meaning of SVORA, after July 1, 1989.

a. S.E. is a "sexual offender" required to register and remain registered under SVORA because he was "sentenced" after July 1, 1989. To be clear, a federal district court acting under the Federal Juvenile Delinquency Act labels the judgment imposed a "disposition," not a "sentence." *See* 18 U.S.C. § 5037. The Montana Youth Court Act likewise does not refer to the disposition following a youth court adjudication as a "sentence." *See* Mont. Code Ann. §§ 41-5-1511 (dispositional hearing), 41-5-1513 (disposition for delinquent youths). But the term "sentenced" in SVORA has a broader meaning. The statutory language embracing adjudications of juvenile delinquents was enacted as part of Section 19 of the 2007 amendments to SVORA. 2007 Mont. Laws ch. 483, § 19. The Montana legislature expressly made Section 19 applicable to all sexual offenders "sentenced" after July 1, 1989. *See id.* § 31. And just two years earlier, this Court had held that a sex offender adjudicated delinquent is "sentenced" within the meaning of a similarly worded SVORA retroactivity provision. *See Villanueva*, ¶¶ 15-17 (interpreting 2001 Mont. Laws ch. 152, § 1, which amended the retroactivity provision of an earlier SVORA amendment to clarify that registration provisions apply retroactively to sexual offenders "who are sentenced by a state or federal court in any state on or after July 1, 1989, or

who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after July 1, 1989"). In light of that decision, and in light of the purposes of SVORA, *Hamilton*, ¶ 14; *State v. Mount*, 2003 MT 275, ¶¶ 44-45, 317 Mont. 481, ¶¶ 44-45, 78 P.3d 829, ¶¶ 44-45, "sentenced" must be read to include dispositions entered by Montana youth courts and other jurisdictions' juvenile courts. *Cf. United States v. McKoy*, 452 F.3d 234, 237-238 (3d Cir.) (treating juvenile court "disposition" as "sentence" for purposes of Section 4A1.2(d) of the United States Sentencing Guidelines), *cert. denied*, 549 U.S. 982 (2006); U.S. Sentencing Guidelines Manual § 4A1.2(d)(2)(A) (2009) (referring to "juvenile sentence"). Accordingly, S.E., whose disposition was entered on June 9, 2005, was "sentenced," within the meaning of SVORA, after July 1, 1989. *See* 6/9/05 Sent. Tr. 1; App. B, *infra*, 23a-26a; *Villanueva*, ¶¶ 15-17.

b. In principle, the Montana Constitution could affect the Court's answer to the certified question of state law, because S.E. would have no duty to register under the 2007 amendments if those amendments were unconstitutional under the Ex Post Facto Clause of the Montana Constitution. This State's Ex Post Facto Clause "in large measure parallels" the federal Ex Post Facto Clause, and this Court has adopted the "intents-effects test articulated" by the Supreme Court of the United States in *Smith v. Doe*, 538 U.S. 84 (2003). *See Mount*, ¶¶ 17, 37. For essentially the reasons stated in the petition for a writ of certiorari filed

with the Supreme Court of the United States, a federal ex post facto challenge to S.E.'s duty to register based on the 2007 amendments to SVORA would fail. *See* Pet. at 14-26, *Juvenile Male*, 130 S. Ct. 2518 (2010) (No. 09-940), *available at* 2010 WL 531758.[5] Based on this Court's precedents, an ex post facto challenge under the Montana Constitution would also fail. *See Hamilton*, ¶¶ 3-4, 17 (finding no Montana Ex Post Facto Clause violation in the enactment of the 2005 amendments to SVORA adding a new registration predicate for a person found guilty of a sexual offense, as a 16-year-old youth, in another jurisdiction years earlier); *Mount*, ¶¶ 89-90 (holding that SVORA does not violate the Ex Post Facto Clause of either the United States Constitution or the Montana Constitution because the Act is nonpunitive in both intent and effect); *cf. Villanueva*,

[5] Questions of federal law—including the scope of the federal Ex Post Facto Clause—would be for the Supreme Court of the United States to address, if necessary, after this Court has answered the state-law question certified to it. *See, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 471 n.23 (1987) ("It would also be inappropriate for a federal court to certify the entire constitutional challenge to the state court, of course, for certified questions should be confined to uncertain questions of state law.") (citing 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4248 (1978)). The Supreme Court of the United States has explained that it certifies questions of state law to the highest courts in the States in order to obtain "authoritative answers" to "novel or unsettled questions of state law." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). Thus, in concluding that S.E. is required to register under SVORA, independent of the conditions of his now-expired federal juvenile supervision, this Court should decide only issues of Montana law.

¶¶ 3, 13, 15-17 (upholding conviction for failure to register as a sexual offender based on a 1993 juvenile adjudication).

* * * * *

Because S.E. has "been adjudicated for" a violation of federal law "in youth court" that is "reasonably equivalent" to a listed Montana "sexual offense," and because he was "sentenced" for that offense after July 1, 1989, he is subject to an ongoing duty to remain registered as a sexual offender under Montana law. *See* Mont. Code Ann. §§ 46-23-504, 46-23-506(1) (sexual offenders required to remain registered for life, with exceptions not applicable here). That obligation arises solely from Montana law and is entirely independent of S.E.'s now-expired juvenile supervision conditions. On that basis alone, this Court should answer the certified question by holding that S.E. is subject to a duty to remain registered as a sexual offender under Montana law and that duty is "unaffected by the validity or invalidity of the federal juvenile-supervision conditions." *Juvenile Male*, 130 S. Ct. at 2519-2520.

B. S.E. is also required to remain registered as a sexual offender under Montana law because he has been adjudicated delinquent for a violation of federal law for which he is required to register as a sex offender under SORNA.

Although the Court need not inquire further, Montana law also obligates S.E. to remain registered as a sexual offender for another reason: he is required

to register (and remain registered) as a sex offender under federal law and this obligation gives rise to a corresponding duty to register as a sexual offender under SVORA. This duty is not entirely independent of federal law, but it is independent of the conditions of S.E.'s now-expired supervision order and is unaffected by the validity or invalidity of those conditions.

Under SVORA, a person has a duty to register as a sexual offender if the person has been adjudicated for a violation of law for which the adjudicating jurisdiction requires registration as a sex offender. *See* Mont. Code Ann. § 46-23-502(9)(b), (10); *Villanueva*, ¶ 16; *see also Hastings*, ¶ 21 (discussing *Villanueva*). That duty, now express in SVORA (Mont. Code Ann. § 46-23-502(9)(b)),[6] existed at the time of S.E.'s delinquency adjudication. In *Villanueva*, this Court interpreted the 2001 amendments to SVORA as creating a duty to register under Montana law based on a foreign state juvenile-court adjudication for which

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[6] In 2005, the Montana legislature amended the definition of "sexual offense" in SVORA to include any violation of a law of another jurisdiction "for which the offender was required to register as a sex offender after conviction" in that jurisdiction. 2005 Mont. Laws ch. 313, § 1 (Mont. Code Ann. § 46-23-502(6)(b) (2005)); *Hamilton*, ¶¶ 9, 13. And, as discussed, the 2007 amendments to SVORA amended that definition to include any violation of a law of another jurisdiction "for which the offender was required to register as a sexual offender after *an adjudication* or conviction." 2007 Mont. Laws ch. 483, § 19 (Mont. Code Ann. § 46-23-502(9)(b)) (emphasis added); *see Hastings*, ¶ 25 & n.1 (Rice, J., dissenting) (explaining that the 2007 amendments clarified application to juveniles adjudicated delinquent, an issue not addressed by the majority). Both amendments apply retroactively to sentences following July 1, 1989. *See* pp. 21-24, *supra* (2007 amendments); *Hamilton*, ¶ 16 (2005 amendments).

registration was required by the foreign state. *See Villanueva*, ¶¶ 15-17 (holding that a defendant who was required to register as a sexual offender under Washington law based on his adjudication of juvenile delinquency in Washington had a corresponding duty to register as a sexual offender under SVORA); *see also* 2001 Mont. Laws ch. 152, § 1. Under *Villanueva*, and consistent with principles of comity, if the adjudicating jurisdiction requires a juvenile adjudicated delinquent to register as a sexual offender, so does Montana.

S.E. has a federal duty to register as a sex offender based on his delinquency adjudication. Specifically, S.E.'s federal duty arises under 42 U.S.C. § 16911(8), which provides that a juvenile is "convicted" of a sex offense under SORNA, and thus is required to register and remain registered under SORNA, if he was "14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18)." *Id.*; *see id.* § 16915(a), (b)(2)(B) (requiring Tier III offenders to remain registered for life with exceptions not applicable here); *see also id.* § 16911(4) (defining Tier III offenders to include those with aggravated sexual abuse convictions under 18 U.S.C. § 2241). "The requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required before the enactment of that Act." 28 C.F.R. § 72.3.

S.E. was 14 years of age or older from , through the completion of the offense on . *See* App. B, *infra*, 23a, 32a. And the offense for which he was adjudicated was a violation of 18 U.S.C. § 2241(c) (2000). App. B, *infra*, 32a. S.E. therefore has a federal duty to register and remain registered as a sex offender under SORNA, and, moreover, that federal duty requires him to register as a sex offender in Montana. *See* 42 U.S.C. § 16913(a) (requiring a sex offender to register in each jurisdiction in which he resides, is an employee, or is a student); *cf. Villanueva*, ¶ 17 (noting that Washington law required the defendant to register as a sexual offender in Montana). Accordingly, under *Villanueva* (and as now codified in SVORA), S.E. has a corresponding duty to register under Montana law.[7]

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[7] That conclusion rests on the understanding that the Montana duty to register attaches if the offender is, at some point after conviction or adjudication in another jurisdiction, required under that jurisdiction's law to register as a sexual offender—not only if the offender has such a registration obligation at the moment of conviction or adjudication. That is consistent with this Court's discussion in *Villanueva* of the duty to register under Washington law. *See Villanueva*, ¶¶ 3-4, 17 (focusing not on the defendant's duty to register under Washington law at the time of his delinquency adjudication, but rather on the duty of which the defendant was notified "two years later," and citing only the then-current 2005 version of the Washington registration law, not the 1993 version in effect at the time of the adjudication). It is also consistent with the text of SVORA, which focuses on the existence of a registration duty "after," not "upon," another jurisdiction's conviction or adjudication. *See* Mont. Code Ann. § 46-23-502(9)(b); *see also Hamilton*, ¶ 16 (stating that under the 2005 amendments, SVORA compels registration in Montana by offenders who "are required" to register in the jurisdiction of conviction).

Importantly, that Montana duty does not depend on the conditions of S.E.'s now-expired juvenile supervision. Rather, it arises directly from the fact of S.E.'s delinquency adjudication. *See* 42 U.S.C. §§ 16911(8), 16913(a). Thus, independent of the supervision order, S.E. is required to register and remain registered under SVORA because he is required to register under SORNA.[8]

C. This Court need not decide whether S.E. is also required to remain registered as a sexual offender under Montana law based on the federal district court's now-expired order requiring him to register as a sex offender.

As explained above, this Court's decision in *Villanueva* (as now codified in SVORA) creates a registration duty under Montana law if the law of another jurisdiction requires a person to register as a sexual offender for an offense adjudicated there. That comity principle may also apply if the adjudicating court orders the juvenile to register as a sexual offender, regardless of whether the jurisdiction's laws require registration. Thus, the federal district court's supervi-

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[8] As explained at p. 23 n.5, *supra*, this Court should decide only issues of Montana law in answering the certified question and should not opine on related issues of federal law, including the scope of the federal Ex Post Facto Clause. For the same reasons, strictly speaking, this Court should not decide the federal-law question whether S.E. has a duty to register under SORNA, but rather should hold as a matter of Montana law that, assuming S.E. has such a duty, then Montana law requires S.E. to register under SVORA—and that state-law obligation to remain registered is independent of the conditions of S.E.'s now-expired juvenile supervision.

sion order might, of its own force, provide an additional basis for a registration duty under Montana law.[9]

Whether the supervision conditions do, in fact, impose such an duty is unclear for at least two reasons. First, this Court has not decided whether a court order alone can support a Montana registration duty under SVORA. In *Villanueva*, the foreign court had ordered the juvenile to register but, in that case, Washington law imposed the same requirement. *See Villanueva*, ¶ 17. Second, neither SVORA nor this Court's cases make clear whether the expiration of the federal court's supervision order would, in turn, eliminate any Montana registration duty premised solely on that order. The United States takes no position on those questions of statutory interpretation, and this Court need not decide them. Because S.E. has an obligation to remain registered as a sexual

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[9] The certified question of law cites Montana Code Annotated § 41-5-1513 (2005), in asking whether the federal court's supervision order requiring registration was critical to S.E.'s duty to register as a sexual offender under Montana law. *Juvenile Male*, 130 S. Ct. at 2519. That version of Section 41-5-1513 provided that a "youth court" may enter a judgment requiring a youth found delinquent for committing a sexual offense to register under SVORA. Mont. Code Ann. § 41-5-1513(1)(c) (2005). That provision thus allowed a court order to create a state-law registration duty, but it only applied to Montana "youth courts" (those created by the Montana Youth Court Act), not juvenile courts in other jurisdictions. *See* Mont. Code Ann. § 41-5-103(49) (2005); *Hastings*, ¶ 16; *Villanueva*, ¶ 15. Any Montana registration duty based on the federal court's supervision order would seemingly arise only under the comity principle recognized in *Villanueva* and now codified in SVORA, *see* Mont. Code Ann. § 46-23-502(9)(b).

offender under Montana law that is not dependent on his now-expired juvenile supervision conditions, determining whether he *also* has an obligation to remain registered under Montana law because of those conditions is not necessary to answer the certified question.

CONCLUSION

For the reasons explained above, this Court should hold that S.E.'s duty to remain registered as a sexual offender under Montana law is not contingent on the validity of the conditions of the now-expired juvenile-supervision order that required S.E. to register as a sex offender, but rather is an independent requirement of Montana law.

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 7,473 words, excluding the parts of the brief exempted by Montana Rule of Appellate Procedure 11(4)(d), and that this brief is double-spaced and prepared in 14-point, proportionately spaced Garamond typeface.

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CERTIFICATE OF SERVICE

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